No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs. Charles W. Mapes, CHARLES W. MAPES, JR., GLORIA MAPES, and CHAS. W. MAPES COMPANY (a co-partnership),

Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

APPELLEES' BRIEF FAILS TO MEET THE ISSUES OF LAW, EQUITY AND FACT TENDERED BY APPELLANT.

The premise of appellees' brief is indicated under the caption "Review of Appellant's Opening Brief" (Br. page 3) as follows:

"Appellant's statement of the case, page 3, states the parties entered into a written agreement 'for a lease of a hotel'. We deny it and say it was a mere preliminary agreement by the parties so declared by

them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provision in the contract." Appellees' categorical denial of our statement in the opening brief "that the parties entered into a written agreement for a lease of a hotel", is an extraordinary and astonishing denial in the face of the facts. The question immediately arises, if the agreement was not for a lease of the hotel, what WAS it for? The agreement itself provides that the parties "contemplated a lease", they manifestly declared that intention and purpose in the written document itself, and certainly their conduct, set forth in the statement of facts in our opening brief, which conduct has not been contradicted, clearly substantiates that intention. The trial court in its finding paragraph 14 (Tr. Vol. 2, pages 918-919), reached the same conclusion as follows: "That on or about April 10, 1946, the defendants (appellees here) *without good cause,* repudiated said written agreement and declined and refused further performance on their part under it and stated to plaintiff (appellant here) *that no lease would be tendered, granted or entered into as contemplated by said agreement.*" (Italics supplied.)

Further, if no lease was intended, why did the parties after continued negotiation enter into a solemn written contract definitely and unequivocally agreeing as to the essential and material terms to be contained in the lease? Why did the defendants (appellees here) demand a large deposit as an evidence of good faith, which the appellant advanced in the belief that they were acting in good faith? Was all this

done as a mere idle pastime, without legal force or significance? Was it the intention of the owner of the property, and her attorney, when she signed this written agreement, under the advice of her attorney, who had redrafted it, that the agreement was a mere vagrant paper to be torn up at will, that it had no binding force, that appellants' written commitment to lease for a stated term, to pay a stated rent, to pay a stated amount to furnish the hotel, to give a mortgage to guarantee the rental, the payment of taxes, upkeep, insurance, interest on borrowed money, and to amortize the debt within said lease period * * * may it be concluded that this written commitment, solemnly agreed upon by all parties, was nothing but a casual exercise in the practice of typewriting and penmanship? It is inconceivable how such an intention may be properly adjudicated from the facts of this case.

Appellees assert that "It was a mere preliminary agreement." They seem to imply some judicial contempt for a written solemnly executed agreement, just because it is preliminary to further action. There seems to be nothing ambiguous about the word "preliminary". It does not seem unfair to state that probably thousands of preliminary written agreements are negotiated in the American business world every day, but because they are preliminary, is there anything in law or equity which *ipso facto* nullifies them, or establishes them as unworthy of judicial consideration? Such is appellees' contention! And with a labored effort of a mass production of authorities, not one, cited in their brief, supports such a manifestly

illegal, inequitable and unconscionable position. Is it the intention of appellees' attorney, who advised upon and redrafted the agreement, presumably with meticulous care, to continue to maintain before this court upon the submission of this appeal, that the agreement, signed by all the parties and carefully witnessed, was of no legal force and effect, and that the ceremony of signing and delivery was but a fleeting fancy? If so, we are prepared to meet the issue. The construction placed by counsel upon this written agreement suggests the comment noted by Roscoe Pound, American Bar Association Journal, November, 1947, page 8, that this must be "spurious interpretation carried to the extreme."

Appellees, after denying it was an agreement for a lease of a hotel, assert that it was a "mere preliminary agreement by the parties so declared by them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provisions in the contract." (Br. page 3.)

Appellees ignore the fact that the trial court in its findings (Tr. Vol. 2, Par. 9, page 917) found that the agreement contained "terms, which were settled and agreed upon by said agreement of September 24, 1945." In a word, there was a definite meeting of the minds by all of the parties as to the settled and agreed terms to be incorporated in the lease. That as to these settled terms there was a definite contract, and manifestly all parties were bound. That by an abundance of authority cited in our opening brief (page 46 et seq.) it is well established law that such an agreement

containing the material and essential terms is sufficiently complete to warrant specific performance. Further, as to these essential terms, there was no "agreement to agree." As to them, it was a completed contract, manifestly so intended by the parties, and so determined by the findings of the trial court. And again, appellees ignore the prime intention of the parties as set forth in the agreement (Tr. Vol. 2, Paragraph 10, page 913) namely "that the said lease shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto, as stated in the preliminary agreement, and also to set forth all usual and necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected."

Further, appellees ignore the fact that the material and essential terms to be incorporated in the lease, having been agreed upon, left only subsidiary and customary terms to be negotiated, which under the weight of well reasoned authority, cited in our opening brief, could not properly defeat specific performance.

Further, appellees attempt to evade the further fact, as found by the trial court and repeatedly referred to in our opening brief, that the appellees repudiated the agreement without good cause, deliberately broke their promise to further negotiate, scorned the appellant's undoubted rights under the agreement, and with the fault of repudiation adjudicated by the trial court to be theirs, appeal to this high court to uphold them in their established breach of faith. Appellees, in

their brief (page 3), assert that the "document never became a valid contract and that therefore there could be no "repudiation". Here they clash with the finding of the trial court, quoted on page 8, par. (g) of our opening brief, wherein the court found, "That on or about April 10, 1946, the defendants, without good cause *repudiated said agreement* and declined and refused further performance on their part under it * * *" (Italics supplied.) If their reasoning be sound and their deduction justified, is their comment on the use of the word "repudiation" an admission that because of its use, in the finding, the trial court recognized the validity of the contract and that it had been "repudiated"? As we have repeatedly contended in our opening brief, the findings of the trial court clearly establish appellant's cause of action and his right to specific performance, and that the conclusions of the trial court, in the face of the findings and the evidence, were erroneous and should be reversed. These findings clearly hold that as to the material and essential provisions of the lease, there was a completed contract. The qualifications and conclusions of the trial court that because further negotiations were contemplated, which under fair interpretation could only be subsidiary and customary, are unjustified in law or equity. And further, it being conceded and found by the trial court, that appellees deliberately without good cause prevented further negotiations and wilfully breached their contract, they were estopped from setting up the breach as a defense; and the trial court was in error in upholding this

illegal violation and protecting the appellees in this concededly broken promise.

Appellees' effort to place some fault on the appellant for a failure of negotiation (Br. page 5) may not be sustained by either the evidence or the findings. The court found that the defendants without good cause repudiated the contract. If the appellant had been at fault for failure to negotiate, which would have tended, at least, to excuse defendants' fault, the trial court undoubtedly would have so found. But the court was precluded from such a finding by the established uncontradicted evidence. Up to the very time of the repudiation, as is stated in our opening brief, the appellees had given no indication whatever to appellant that a lease would not be granted. Up to that moment, the parties were cordial. Conditions were apparently harmonious. The hotel was in course of construction. The sudden repudiation of the contract fell on the appellant like a blow in the night. With contemptuous disregard for their written commitments, their long association with the appellant and his whole-hearted co-operation, aid, invaluable experience and advice, they kicked him out. These are the blunt facts. They forced him to seek relief in a court of equity. And in defense of that suit, they contend that their written word meant nothing; that they never intended to respect their promises; that the written contract was camouflage to conceal some ulterior purpose, and that the ten thousand dollars they took from the appellant was merely a financial gesture to make him believe they were acting in good faith

as a "come on" for useful service and advice until they were ready to seek other fields of conquest.

APPELLEES EVADE AN IMPORTANT POINT INVOLVED IN A CONTRACT FOR A LEASE.

Beginning at page 46 of our brief, we contend that a contract for a lease which contains the material and essential terms to be embodied in the lease is a completed contract, even though the parties contemplated the subsequent execution of a formal contract. This contention has been amply supported by respectable authority. These authorities further set forth what are the essential and material terms of a lease; and there is no question that these material and essential terms, and more, are contained in the contract under consideration here. They are set forth on page 19 of our opening brief. Appellees avoid this statement of law, equity and fact by declaring there was no contract, that it was a preliminary useless document because the parties agreed upon further negotiation, for what? If by fact and definition the material and essential provisions are admittedly set forth in the agreement, what was there left to negotiate? Obviously, subsidiary matters of relatively minor importance and matters customarily included in leases. This was undoubtedly what the parties intended, or they would not have been so scrupulously careful in setting forth the material and essential provisions in a solemnly executed, written and witnessed document. Appellees do not assert or argue in their brief what

this intention was. Having been confronted with litigation, they content themselves with broad statements that there was no contract, that if there was a contract it was only preliminary, that a preliminary contract is no good anyway, and always realizing it was no good anyway, they entered into it to put in time for an idle day.

No stronger pronouncement of the position of the appellees may be made than that set forth in the comments of one of the court citations noted in our opening brief. We again respectfully refer this court to the case of *West Heights Realty Corporation v. Adelman,* 152 Atl. 196, cited in our opening brief on page 23, very much like this case, and hardly given passing notice in appellees' brief. As the court noted there, and is so forcefully applicable here, that the position of the defendants, "seems to amount to a plain declaration that the entire contract was invalid in law and in equity; was a vain form; and that neither party acquired any rights of any kind under it."

THE RULE IN NEVADA IN WHICH JURISDICTION THE AGREEMENT WAS EXECUTED.

There are two established principles of equity in Nevada controlling the remedy of specific performance, both of which have been noted in cases cited in our opening brief. (Br. page 63.) One is, that "Courts of equity ought to determine the rights of parties according to the broad principles of justice and fair dealing and not by the technical and refined

distinctions of the law". This is a fundamental doctrine, pronounced by the highest court of the state, in a specific performance case. If this doctrine is to apply here (*Erie Railroad Co. v. Tomkins,* 304 U.S. 64, 82 L. Ed. 1188), on which side does justice and fair dealing lie? Will justice and fair dealing uphold the appellees in their wilful breach of a contract without good cause, will it condone their inequitable conduct toward the appellant, will it dismiss the appellant without right or remedy, or will it compel the appellees to perform their solemn obligations? If justice and fair dealing are the foundation stones upon which equitable doctrines are built, then the record in this case overwhelmingly establishes the equities in favor of the appellant.

The other established principle of equity as applied to specific performance cases in Nevada may be found in the case of *Dondero v. Turrillas,* 59 Nev. 374, 94 Pac. (2d) 276, cited in our opening brief (page 63). This doctrine is, we have repeatedly urged here, that if parties reach an agreement upon the *essential terms* of a lease, specific performance should be decreed. This opinion is a late expression by the Supreme Court of Nevada in a specific performance case. There was no express contract entered into, as in the instant case. The agreement was adjudicated on the basis of correspondence and oral negotiation. A lease was contemplated. To this end, a form of lease was submitted and exchanged by respective attorneys for the parties, but both attorneys refused to agree to the form proposed. The suit for specific performance

resulted. The point was raised there, as here, "that the memorandum was merely preliminary and that it was contemplated by the parties that something yet was to be done, that further conferences were to be had. But the trial court further found from the substantial evidence that on the evening of January 15, 1938, the parties reached an agreement *"and that the essential terms thereof were embodied in the memorandum and in the reference to the old lease."* (Italics supplied.) (Citation from page 283 Pacific citation.) The Supreme Court affirmed the decision of the trial court, establishing the rule in Nevada that the essential terms in an agreement for a lease were sufficient to warrant specific performance. There, as here, there was a preliminary agreement. There, as here, a lease was contemplated, the details of which, aside from the essential terms, were manifestly to be agreed upon by the parties. But the court granted specific performance, despite the conjecture whether they would agree or not, and obviously reserved its equity powers to see to it that a lease was executed which faithfully carried out the main essentials, as agreed upon, and the intent of the parties so as to give fair force and effect to the primary obligation. We respectfully submit that the conclusion of the trial court, and the contention of counsel, that it may not be ascertained whether appellant would accept a tendered lease, and for this reason specific performance should be denied, find no support in the administration of equity. It is the function of equity to interpose its powers that discordant parties, in a matter of this kind, may be brought together upon the basis of fairness and justice.

APPELLEES' BROKEN PROMISE TO NEGOTIATE.

Confronted with the uncontradicted and highly important fact supported by the finding of the trial court (second sentence par. 13, Tr. 918), that appellees violated their written promise to negotiate, and precluded all possibility of negotiation, by suddenly repudiating the contract without good cause, they reply (1) (Br. page 7) that there was no valid contract. (2) That the court found there was no request for negotiation, and that, (3) as the appellant had a reasonable time and more for negotiation, and did not request it, "the defendants had an undoubted right on April 10, 1946, to treat the agreement as of no effect."

At this point (1), we again reiterate, with conviction, that the evidence and the findings of the trial court, undoubtedly establish a contract. It seems unnecessary here to repeat the argument or to amplify it.

As to point (2) and (3) if we understand the contention, it is urged that the fault of negotiations rests with appellant, because he had a reasonable time to negotiate, and not having done so, the appellees were justified in cancelling the contract. In a word, though the findings of the trial court (par. 13, page 918) established that no negotiation was requested by either party, the burden and fault must be placed upon the appellant, even though another finding of the trial court (many times repeated in our briefs) conclusively establishes that the appellees breached the agreement without good cause. No cross-appeal has

been taken here and we note no attempt on the part of appellees to disturb this finding. It can only mean that the appellees had no valid reason or justification for the breach and that it was purely and solely their fault. Further, the evidence conclusively shows that the appellant was led on in the belief he would get a lease, that the time element had long since been waived, the hotel was in process of construction, and as the finding indicates neither party was concerned about haste for further negotiation. But, aside from all this, it was the undoubted duty of the owner of the property to submit a lease for consideration. It was her grant of interest to a prospective tenant and the burden of approach was upon the appellees.

> "The true rule independent of any usage on the subject, would seem to be that the party who was to execute and deliver a deed should prepare it."
>
> *Willard v. Taylor,* 19 L. Ed. 501, citation from page 505.

APPELLEES ESTOPPED FROM SETTING UP THEIR ADMITTED BREACH AS A DEFENSE TO SPECIFIC PERFORMANCE. THEIR REPLY TO THIS PRINCIPLE UNSUPPORTED BY THE EVIDENCE BY LAW OR EQUITY.

Appellees admit the rule "that a promisor shall place no obstacle in way of happening of a condition precedent; that where he prevents fulfillment of a condition precedent he cannot rely on such condition." (Br. page 7.) Their answer to this is that the contract was incomplete. We have contended that the contract was complete as to its main essentials, which we again urge here; but even according to appellees'

theory, it only took further negotiation to complete it, and this the appellees arbitrarily and without good cause prevented. In preventing it, they violated their commitment and promise under the contract, and rely upon this breach and violation as a means of defeating the contract. This, under the authorities cited in our opening brief, they are estopped from doing. The case cited in appellees' brief, *O'Donnell v. Lebb,* 178 Pac. 212, 213, has no application because there the facts show a continuance of the time element, while here, the findings establish that the time element was waived. It seems pertinent to note here, in passing, that this cited case (page 213) announces a rule we are contending for here, that

> "A court of equity, having before it the parties and the subject matter, may decree specific performance of a contract so far as the defaulting party can be made to perform."

Appellees misquote finding 13 (Tr. page 918) of the trial court in asserting that the trial court found that the "breach" was "the fault of both parties". (Br. page 5.) What the court found was "that the violation of the so-called time limitation in said agreement was the fault of both parties." Nowhere in the findings has the trial court qualified its definite findings that the defendants repudiated the contract without good cause. The appellant by evidence and findings has been found blameless of fault for the broken contract.

Appellees contend that to invoke the doctrine of estoppel, prejudice and damage must arise. (Br. pages

5-7.) In support of this contention they refer to findings 5 and 7, which do not find that the plaintiff was not prejudiced or damaged. No. 5 states that the plaintiff was not requested by defendants to secure a loan, but that he did attempt to assist in procuring the loan. No 7 states that plaintiff did not sell another hotel at considerable or any sacrifice. The evidence conclusively shows that he disposed of his other hotel interest to devote his time and energies to the hotel in question here, to which he had every reason to believe he would get a lease. As we specifically set forth in our opening brief, he was cooperating with the defendants to that end. He was conferring with them, with the architect and builder, giving his time, travelling, spending his own money and part-performing in interviews with dealers for furnishing the hotel, which under the contract, he was obligated, in part, to do. He was losing interest returns on the $10,000.00 deposit he put up on the basis of a good faith, which was betrayed. Such is an outline of the uncontradicted facts conclusively showing that this sudden repudiation pecuniarily prejudiced and damaged him. Further, because of his warranted reliance on the contract he had, his time and attention were diverted from any other possible business enterprises and were concentrated on the hotel lease in question which, he had every reason to believe, would be given him. In the face of these facts, which are supplemental to those stated in our opening brief, it seems clear that appellees are estopped from relying upon a defense founded upon their wilful and condemned repudiation of their contract without good cause.

APPELLEES' AUTHORITIES AND CITATIONS CONSIDERED.

A separate analysis of the authorities cited by appellees would be impossible within the page limitation of this brief. However, it may be generally and properly asserted that the basis of all authorities cited is that the evidence established that the parties did not intend the agreement to be binding. From the evidence disclosed by the record in this case, and as we have repeatedly urged, there seems to be no question but that the parties intended the agreement in evidence here to be a binding contract. Further, there is no support by cited authorities in appellees' brief that law or equity sanctions a party to an agreement, without regard to the rights of the other party, wilfully to violate his promise or obligation, and further to set up that violation as a defense against a suit for specific performance or, for that matter, against an action at law. None of the authorities cited encourage or condone such a brazen violation as we have here, and, we assert with confidence, none may be found.

Further, an examination and analysis of the authorities reveal that in a large majority of cases the courts stress the lack of "material" or "essential" terms in the contract as a reason for denying relief. An example of this is *St. Louis etc. v. Gorman,* 100 Pac. 647, 649, cited on page 18 of their brief, wherein the court among other things declares, "So, to be enforceable, a contract to enter into a future contract must specify all of its material and essential terms." But, as we have above indicated, none of these cases

refer to or pass upon a wilful violation of a contract for a lease, preliminary, contingent or otherwise, which denies to the other party the right of further negotiation, or any other right.

Appellees (Br. pages 40 and 46) refer to the leasing of the hotel garage as a matter to be adjusted by the lease and mutually agreed upon. It must be admitted that this manifestly is a minor matter and not a material or essential part of the contract. In fact, the wording of this paragraph (Tr. Vol. II, pages 911-912) expressly shows that it was a matter of indifference whether the garage was to be included in the lease or not. If it was, then the lessees were to pay 10% of the gross receipts, if it was leased to a third person the lessees of the hotel were to have the privilege of garage service for their guests on terms to be mutually agreed upon. It is quite apparent that either arrangement was satisfactory to all parties; and besides, it was a definite commitment as to what disposition by contract should be made of the garage. It is further evidence that the contract entered into was intended by the parties to be a contract for a lease, which appellees deny. It is also a striking illustration of how the appellant was denied further negotiation by the arbitrary action of the appellees, in refusing not only further to negotiate for the lease of the hotel, but for the garage.

We concede the highly discretionary powers of courts of equity. We are in accord with the salutory rule that fairness and justice are the controlling factors in equity jurisprudence. We believe, also,

that the appellant is amply justified in urging here the well established equitable maxim that "Equity regards as done that which ought to be done". (Assgnt. Error No. 12, Br. pages 13-14.) We believe that appellees who were committed by contract to further negotiate for a lease, should in equity be compelled to perform and that this honorable court, in conformity with equity, should regard as done that which ought to be done. That the decree of the trial court should be reversed and that the appellant should be given the remedy to which he is justly entitled.

Dated, Reno, Nevada,
December 26, 1947.

Respectfully submitted,
SAMUEL PLATT,
Attorney for Appellant.